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Reply Brief of Peck, Carey & Hanson for Petitioner

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

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64, 63

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JACOB WAY,
Petitioner,

THE HOISTING ELEVATOR COMPANY,
Petitioner,

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

C. H. EVERETT, Receiver of the Chicago, Peoria & St. Louis Railway Company,
Respondent.

For Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY TO BRIEF AND ARGUMENT FOR RESPONDENT.

1527

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

JACOB RAU,
Petitioner,

THE HUNTTING ELEVATOR COMPANY,
Petitioner,

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF IN BEHALF OF PETITIONERS.

I.

Opposing counsel persist, notwithstanding it is stipulated, as the fact is, that the carloads of barley in question were all consigned to consignees at *St. Louis, Missouri*, via East St. Louis, Illinois, that their destination was *not* St. Louis, Missouri, but East St. Louis, Illinois. By referring to the stipulation of August 27, 1895 (Rau Rec., 31-34), the court will see that the parties to this litigation stipulated the fact to be that the several carloads of barley were consigned to the "*Teichmann Commission Company*,

St. Louis, Missouri, by way of East St. Louis, Illinois." Opposing counsel seek to evade the effect of this stipulation by refining on the words *"consigned"* and *"destined."* Whatever difference there may be in the technical meaning of these words, the word *"consigned"* as used in shipping receipts and bills of lading has a well understood and accepted meaning. In the case of goods delivered to a carrier at New York City consigned to Marshall Field & Co., Chicago, Illinois, by way of Buffalo and the lakes, or by way of Buffalo and the Lake Shore and Michigan Southern Railway, no one would presume to seriously assert that Chicago was not the *destination* of such a shipment.

It indisputably appears from the entire record in these causes that the destination of this barley was St. Louis, and that it would have been forwarded there in due time had it not been destroyed by fire.

But if opposing counsel are correct in their contention that East St. Louis was the destination of this barley, why the claim of the Receiver that he had made a delivery of it to the Terminal Association as the connecting carrier? If East St. Louis was the destinaton, then upon no rational theory can it be claimed that there had been a delivery of the barley to the Terminal Association, for there would have been no occasion to make a delivery to that Association; and the conclusion inevitably follows that the Receiver had the possession and control of it at the time of the fire, and is liable as either carrier or warehouseman.

Thomas v. *Ry. Co.*, 19 C. C. A., 90.

II.

The case of *Texas & Pacific Railway Company* v. *Clayton*, decided by this court in February last, and reported in 173 U. S., 348, is, we think, decisive of these cases. In that case the principal question involved was whether the goods at the time they were destroyed by fire were in the possession or under the control of the connecting carrier, the Steamship Company. This court held, notwithstanding that the goods had been placed by the railway company upon the wharf of the steamship company, and that was the place at which the steamship company was to receive the goods from the railway company for further transportation, they were not in the possession or under the control of the steamship company, for the reason that it had not given "*a mate's receipt*" for the goods or assumed control of them. The railway company in that case was in a more favorable position than is the Receiver in these cases; for in that case the cotton had been placed upon the wharf of the steamship company ready for delivery, while in these cases, the carloads of barley were at the time of the fire standing upon the tracks which the Receiver used for storing his cars and which he had the right to use under his agreement with the Terminal Association. (*See Agreement*, Rau Rec.,100; *Stipulation*, Rau Rec., 31, 32; *Testimony*, Rau Rec., 70, 73, 74, 75, 76, 77 and 187. *Proofs of loss sworn to by the Receiver's agent at East St. Louis*, Rau Rec., 163, 164.) The distinction, therefore, between these cases and the *Clayton* case is that the cotton in the latter case had been placed by the railway company upon the wharf of the steamship company, ready for delivery to that company, while in these cases the carloads of barley were yet stand-

ing upon the tracks which the Receiver used and had the right to use for the storage of cars under his agreement with the the Terminal Association. The cases are alike in this respect: The railway company in the *Clayton* case had not sent to the steamship company a *"transfer sheet"* which is substantially the same as a "way-bill," nor had the steamship company *"given a mate's receipt for the cotton"* as was the custom to do when a delivery was made; the Receiver in these cases had not delivered to the connecting carrier the usual way-bill indicating the number and initials of the cars, the contents, weight, rate, etc., the consignor, consignee, route and destination; neither had the connecting carrier receipted for the same as was done whenever a way-bill was delivered.

But this is not all. The Receiver's agent at East St. Louis testified (Rau Rec., 190) that an arrangement existed between the Receiver and the consignees to hold their barley until he received word from them, after having notified them of its arrival, where in St. Louis they wanted it sent, and upon getting this word he would make out a way-bill for the car or cars to be delivered, take it to the agent of the Terminal Association and take his receipt. Thereupon the Terminal Association would take the car or cars specified in such way-bill from the Receiver's tracks and place them upon its tracks. With respect to the cars in controversy, the Receiver's agent had not notified the consignees of their arrival, nor had the consignees of the barley sent the usual word to him where in St. Louis they wanted the cars sent; and the testimony shows that the Receiver was holding this particular barley at the time it was destroyed, awaiting the orders of the consignees as to where in St. Louis they wanted it sent. He, therefore, up to the time of the fire

retained full control of the cars in question, and conceding that they were on the tracks of the Terminal Association at the time they were destroyed, there had not yet been such a delivery of them as would, under the rule announced in *Texas & Pacific Railway Company* v. *Clayton, supra,* relieve the Receiver of liability,

The testimony in these cases shows, and it is undisputed, that under the custom which prevailed at East St. Louis, a car was never treated as delivered by the Receiver to the Terminal Association until a way-bill therefor had been delivered to that association and its receipt therefor taken. These way-bills were made out by the agent of the Receiver at East St. Louis, and when a delivery of a car was desired to be made to the Terminal Association or to the Wiggin's Ferry Company, such way-bill would be delivered and a receipt therefor taken. This is shown by the testimony of the Receiver's agent and his chief clerk:

"Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way-bill delivered?

A. Yes, sir.

Q. *Then the Terminal Association would take these cars, according to the direction on the way-bill?*

A. *Yes, sir.*" (Rau Rec., 188, 189.)

This same witness in testifying in behalf of the Receiver concerning the custom under which the barley, consigned to the Teichmann Commission Company and others, was handled by the Receiver at East St. Louis, testified as follows:

"Q. Won't you state again just what you stated be-

fore, so I will understand it, with reference to the custom in respect to barley coming to East St. Louis, *consigned to Teichmann & Co., St. Louis.*?

A. With reference to Teichmann's barley we would have orders in our office, in advance of the arrival of the cars, what disposition to make of them; others we wouldn't. Those we didn't, when they came, we sent Mr. Teichmann notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would at his pleasure advise us to send the car so and so, to Hines' brewery, say. *We would make out a way-bill for the car, consign it that way and deliver it to Felps.*

Q. *Mr. Felps of the Terminal Association*?

A. *Yes, sir.*

Q. So until you received this notice back you would hold that car, awaiting transportation back across the river, if he ordered it?

A. While the car was being held there as to the relationship existing there I am not competent to say.

Q. Not asking for the relationship; if you held this car under those circumstances, awaiting the destination across the iver-order.?

A. Inasmuch as we had no engine there, and could not control where we put the car, we naturally could not hold it, because if Mr. Felps was so disposed, he could put it where he pleased.

Q. Could Mr. Felps deliver it without a way-bill?

A. Not as a general thing.

Q. Would he in any instance?

A. I have known it to be done.

Q. But that is an exception?

A. Yes, sir.

Q. *The general custom was, he would not undertake to move it until he got a way-bill*?

A. *That is right.*

Q. *And you delivered the way-bill when you got direction from the consignee, and just to the point he wanted*?

A. *Yes, sir.*

Q. *That car stood there awaiting the way-bill*?

A. *Yes, sir; awaiting that way-bill, and where Mr. Felps would put it.*" (Rau Rec., 190, 191.)

The agent of the Terminal Association at East St. Louis testified as follows:

"Q. When you receive the way-bill of a car, what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A Yes, sir. Consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard—their portion of the yard, and place it in the train in our portion of the yard and take it to the connection or destination indicated.*" (Rau Rec., 74, 75.)

The Terminal Association had neither the control nor custody of the carloads of barley in question at the time of the fire. While it is true these cars were on tracks in the yards of the Terminal Association, yet the tracks upon which they stood at the time of the fire were the tracks which the Receiver used and had the right to use for the storage of his cars under his agreement with that association. For the purpose which the Receiver used these tracks, they were as much his as they would have been had he owned them outright. This, in connection with the fact that the Receiver had not up to the time of the fire delivered to the Terminal Association a way-bill for any of the cars in question, and that the association had not receipted for any of them, as was the custom to do whenever a delivery was made by the Receiver to that association, proves conclusively that the carloads of barley at the time they were destroyed by fire were yet in the custody and under the control of the Receiver.

This conclusion is made absolutely certain by the testimony of the chief clerk of the Receiver's agent at East

St. Louis, who testified to the custom of handling the barley business at that station. (Rau Rec., 190.) He testified that upon the arrival of the carloads of barley at East St. Louis, he would notify the consignees thereof and ask them what place in St. Louis they wanted the barley delivered. That upon being advised by the consignees, he would "*make out a way-bill, take that to Felps* (the agent of the Terminal Association) *and take his receipt.*" The fact is undisputed that the chief clerk had not made out or delivered to the Terminal Association a way-bill for any of the cars in question. And without the delivery of a way-bill to the Terminal Association it is apparent that that association would have neither the control nor the custody of the cars. Without the information contained in the way-bill,(quoting from the opinion of Judge JENKINS):

> "*It had not knowledge of their destination. It had not knowledge of the consignee of them. It could not know whether these cars were to be transported over its line or the lines of the Wiggin's Ferry Company. It could not know in what direction they were to be transported, or their ultimate destination. They were subject to the direction and control of the Receiver.*"

The converse is likewise true, for until the Receiver had delivered the customary way-bills to the Terminal Association, and taken its receipts therefor, he still retained the full control and custody of the cars.

III.

The claimed arrangement between the consignees and the Terminal Association which is so much relied upon by opposing counsel, was not effective as to the carloads of barley in question, for two reasons:

1. *There had been no delivery of the barley to that Association.*

2. *The arrangement by its terms had not yet become effective. And the undisputed testimony, coming from the Receiver's agent at East St. Louis, shows that this particular barley at the time it was destroyed was being held by the Receiver under an arrangement he had with the consignees to hold their barley awaiting their orders as to where in St. Louis they wanted it sent.* (Rau Rec., 190.)

The arrangement claimed was, that the Terminal Association agreed to hold cars on ITS TRACKS at East St. Louis FREE OF CAR SERVICE, (Rau Rec., 239.) It is apparent that this arrangement applied only to cars on which the Terminal Association would have had the right to charge car service had no arrangement of the kind been made. If while the cars were standing on the tracks which the Receiver used and had the right to use for the storage of his cars under the agreement he had with that Association for handling and storing his cars, that Association had no right to make a charge for car service against the consignees, then the claimed arrangement had not yet become effective as to the barley in question. That the car-loads of barley in controversy were standing on the tracks set apart for the use of the Receiver under the aforesaid agreement, and that such tracks were the tracks commonly and usually used by the Receiver in handling and storing his cars, are established facts in these cases—established by the stipulation of the parties as well as by the testimony which is undisputed. *That the Terminal Association had no right to charge the consignees of this barley for car service while the cars containing it were standing on the Receiver's tracks, is too plain to admit of discussion.*

And further, it cannot be presumed that the Terminal Association would, after having given the Receiver the right to store cars on certain of its tracks, make arrangements with the consignees of such cars, that while they were standing upon such tracks, it, the Terminal Association, would hold them there *free of car service*, or make arrangements to hold them at all. The very language "hold cars on its tracks free of car service," precludes the inference that the proposed arrangement applied to cars while they were standing upon the tracks which the Receiver used under his arrangement with the Terminal Association. On the contrary, the fair and reasonable inference is that the arrangement was made to relieve the consignees of car service charges after the cars had been delivered to the Terminal Association, and the cars were being held by it on its tracks; for up to the time of such delivery, any arrangement for holding the cars would naturally be with the Receiver, and the testimony of the Receiver's agent shows conclusively that such an arrangement existed between the Receiver and the consignees of this barley, and at the time of the fire the Receiver was holding the cars in controversy under that arrangement. So that until there had been a delivery of the cars to the Terminal Association in the usual and customary way that deliveries were made by the Receiver to that Association at this place, the arrangement which that Association had with the consignees to hold their barley on its tracks free of car service did not become effective.

It follows, therefore, that the arrangement claimed had not by its terms become effective as to the cars of barley in controversy, and was not intended to be, either by the consignees or the Terminal Association, until there

had been a delivery of the barley, and the custody and control of it had passed to that Association. And the custody and control of it could not pass and were not intended to pass, until the Receiver had divested himself thereof by delivering to that Association the customary way-bill and taking a receipt therefor.

But apart from these considerations, the testimony which the Receiver himself offered proves conclusively that this claimed arrangement between the Terminal Association and the consignees was not effective as to the Teichmann Commission barley or to any barley until the Receiver's agent at East St. Louis had delivered to the Terminal Association the customary way-bill and taken its receipt therefor; that up to the time that such way-bill had been delivered, the Receiver and *not* the Terminal Association was holding this barley under an arrangement *he* had with the consignees. The following testimony given by Stapleton, the chief clerk of the Receiver's agent at East St. Louis, proves this conclusively:

"Q. Won't you state again just what you stated before, so I will understand it, with reference to the custom in respect to barley *coming to East St. Louis, consigned to Teichmann & Co., St. Louis*?

A. With reference to Teichmann's barley, we would sometimes have orders in our office, in advance of the arrival of the cars, what disposition to make of them, others we wouldn't. Those we didn't, when they came; we sent Mr. Teichmann notice that the cars were there, what shall we do with them? Virtually that is the substance; and he would, at his pleasure, advise us to send the car so and so, to Hine's brewery, say. We would make out a way-bill for the car, consign it that way, and deliver it to Felps.

Q. Mr. Felps of the Terminal Association?

A. Yes, sir.

Q. So until you received this notice back you would

hold that car, awaiting transportation back across the river, if he ordered it?

A. While the car was being held there as to the relationship existing there I am not competent to say.

* * * * * * *

Q. The general custom was, he (Felps) would not undertake to move it until he got a way-bill?

A. That is right.

Q. And you delivered the way-bill when you got direction from the consignee, and just to the point he wanted?

A. Yes, sir.

Q. That car stood there awaiting that way-bill?

A. Yes, sir; awaiting that way-bill." (Rau Rec., 190, 191.)

This testimony in connection with the testimony of the Receiver himself (Rau Rec., 228), that while he was holding this barley and prior to the delivery of the way-bill therefor to the Terminal Association, that association would not recognize any order or directions from the consignees, but that the consignees would give their directions to his agent at East St. Louis and that upon receiving such directions, his agent would make a delivery to the Terminal Association according to such directions, proves conclusively that the arrangement which counsel stated he expected to prove between the consignees and the Terminal Association had no application to the barley while the Receiver was holding it in his possession awaiting the orders of the consignees for its further movement, and only became effective after there had been a delivery of it by the Receiver to the Terminal Association in the usual and customary way that deliveries of barley were made at that point.

IV.

But it is contended by opposing counsel in their brief that the Receiver is sued as a carrier and cannot be held liable as a warehouseman.

The answer to this contention is two-fold:

1. The Receiver is not sued in the sense claimed by counsel, and the strict rules of common law pleading have no application. These are interventions in receivership proceedings, and the court has full power to make such orders or decrees as the manifest justice of the case requires.

2. The Receiver is not sued as a carrier. It is stated in the intervening petitions that while the carloads of barley were still in tansit and on their way to destination in the possession and under the control of the Receiver, he negligently caused and permitted them to be placed in close proximity to a large wooden warehouse filled with baled and loose hay through which locomotive engines were constantly passing and repassing, which hay and warehouse, taking fire, were consumed, along with the cars containing the barley. (Rau Rec., 20, 22, 52.) It is wholly immaterial whether the Receiver had possession as carrier or as warehouseman. If at the time of the fire the property was in transit as the Receiver's agent at East St. Louis stated it was at the time he swore to the proofs of loss (Rau Rec., 163, 164) then he held it as a carrier and is liable as such. On the contrary, if he held it as a warehouseman, he is liable for negligently storing it close by a long wooden warehouse filled with loose hay, which is characterized in his answer to the intervening petitions as a "veritable fire

trap." *Thomas* v. *Ry. Co.*, 19 C. C. A., 90. In disposing of the intervening petitions, the court was not bound by the strict rules of pleading at common law, but had full power to make such orders or decrees as the showing before the master warranted.

V.

The conditions and rules stated by opposing counsel, on pages 122 and 123 of their brief, as being on the back of station receipts and way-bills and bills of lading, have no application to these cases.

As to the way-bills. There are no rules or conditions on either the *front* or *back* of the way-bills, and counsel is in error in stating that there are. See way-bills, Rau Rec., 141-145.

As to the station receipts and bills of lading. The shipments of barley were not made under station receipts or bills of lading. It appears that the station receipts which were introduced in evidence were not made out or delivered to the consignees until months after the shipments were made (master's report, Rau Rec., 59); that all of the shipments of barley were made under shipping bills that had on them no limitations or restrictions whatever; that long after the barley was destrooyed, the consignees were required by the Receiver to make proof of shipment, and to do this applied to the agent of the railway company for such proof, and the station receipts which appear in evidence were then furnished. The bills of lading referred to on pages 40 and 112 of record relate to a shipment of

sash, doors and blinds from Dubuque, Iowa, and do not concern these cases.

But conceding all that is claimed by opposing counsel in behalf of the limitations and restrictions contained in the station receipts and bills of lading, the Receiver is liable under the rule announced in *Texas & Pacific Railway Company* v. *Clayton, supra;* for not having delivered to the Terminal Association the customary way-bills and taken its receipt therefor, he had not divested himself of the custody and control of the barley at the time of the fire. It was, therefore, actually in his possession and under his control, and not in the possession or control of the Terminal Association.

VI.

But counsel for Receiver says that, conceding the carloads of barley were being stored by the Receiver at the time of the fire on tracks which he used under his agreement with the Terminal Association, as in fact they were (*stipulation*, Rau Rec., 31-34), he is still not liable for the loss, for the reason that while they were so held he held them as a warehouseman. The answer to this contention is that he had arranged with the consignees to hold their barley awaiting their orders as to when and where it should be forwarded to St. Louis. (Rau Rec., 190, 191.) While so holding it, he was bound to exercise reasonable care toward it, and under all the authorities it was negligence to allow or permit this barley to be stored by a long wooden warehouse—"a veritable fire trap"—through and by which locomotive engines were constantly

passing, which taking fire was itself consumed along with the cars of barley. The case of *Thomas* v. *Ry. Co.*, 19 C. C. A., 90, is precisely in point.

Respectfully submitted.

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